No. 59

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

FRANK COSTELLO, *Petitioner*

v.

UNITED STATES OF AMERICA

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF FOR PETITIONER

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CITATIONS

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OPINIONS BELOW

The opinion of the District Court is reported at 71 F. Supp. 10, and the opinion of the Court of Appeals is reported at 275 F.2d 355.

JURISDICTION

The judgment of the Court of Appeals was entered n February 17, 1960 (R. 255). The petition for a rit of certiorari was filed on March 18, 1960, and a notion for leave to amend the petition was filed on April 15, 1960. On May 16, 1960 the petition was ranted and the motion to amend was assigned for earing and consolidated with the argument on the nerits in *United States* v. *Lucchese*, No. 57, Oct. Term 960. The jurisdiction of this Court is invoked under 8 U.S.C. § 1254(1).

STATUTES INVOLVED

Section 340(a) of the Immigration and Nationality Act of 1952, 66 Stat. 260, 8 U.S.C. § 1451:

"(a) It shall be the duty of the United States district attorneys for the respective districts, upon affidavit showing good cause therefor, to institute proceedings in any court specified in subsection (a) of section 310 of this title in the judicial district in which the naturalized citizen may reside at the time of bringing suit, for the purpose of revoking and setting aside the order admitting such person to citizenship and canceling the certificate of naturalization on the ground that such order and certificate of naturalization were procured by concealment of a material fact or by willful misrepresentation, and such revocation and setting aside of the order admitting such person to citizenship and such canceling of certificate of naturalization shall be effective as of the original date of the order and certificate, respectively: *Provided*, That refusal on the part of a naturalized citizen within a period of ten years following his naturalization to testify as a witness in any proceeding before a congressional committee concerning his subversive activities, in a case where such person has been convicted of contempt for such refusal, shall be held to constitute a ground for revocation of such person's naturalization under this subsection as having been procured by concealment of a material fact or by willful misrepresentation. If the naturalized citizen does not reside in any judicial district in the United States at the time of bringing such suit, the proceedings may be instituted in the United States District Court for the District of Columbia or in the United States district court in the judicial district in which such person last had his residence."

Section 605 of the Communications Act of 1934, 48 Stat. 1103, 47 U.S.C. § 605:

"No person receiving or assisting in receiving, or transmitting; or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof, except through authorized channels of transmission or reception, to any person other than the addressee, his agent, or attorney, or to a person employed or authorized to forward such communication to its destination, or to proper accounting or distributing officers of the various communicating centers over which the communication may be passed, or to the master of a ship under whom he is serving, or in response to a subpena issued by a court of competent jurisdiction, or on demand of other lawful authority; and no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person; and no person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by wire or radio and use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto; and no person having received such intercepted communication or having become acquainted with the contents, substance, purport, effect, or meaning of the same or any part thereof, knowing that such information was so obtained, shall divulge or publish the existence, contents, substance, purport, effect, or meaning of the same or any part thereof, or use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto: *Provided*, That this section shall not apply to the receiving, divulging, publishing, or utilizing the contents of any radio communication broadcast, or transmitted by amateurs or others for the use

of the general public, or relating to ships in distress."

Rule 41(b), Federal Rules of Civil Procedure:

"Involuntary Dismissal: Effect Thereof. For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him. After the plaintiff has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. In an action tried by the court without a jury the court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52(a). Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction or for improper venue, operates as an adjudication upon the merits."

QUESTIONS PRESENTED

1. Whether petitioner can be denaturalized for representing that his occupation was "real estate" when he was concededly engaged in the real estate business and the government's inquiry could reasonably be interpreted as calling for no more than his legal occupation.

2. Whether the Court is entitled to draw any inference from petitioner's failure to take the stand in a denaturalization case.

3. Whether due process permits denaturalization where citizenship was granted thirty-three years prior to the institution of suit, the facts alleged as a basis for denaturalization were known to the government thirty-two years prior to the institution of suit, and many material witnesses have become unavailable by reason of death.

4. Whether a decree of denaturalization may rest in part upon evidence tainted by wiretapping.

5. Whether the present proceedings are barred by entry of an order dismissing prior denaturalization proceedings against petitioner, which was entered pursuant to the mandate of this Court and which did not specify whether it was with or without prejudice.

STATEMENT OF THE CASE

Petitioner came to the United States from Italy in 1895, when he was four years old. He was admitted to citizenship by the United States District Court for the Southern District of New York in 1925.

This case represents the government's second attempt to revoke petitioner's citizenship. On October 22, 1952, it filed a complaint seeking his denaturalization under § 338 of the Nationality Act of 1940, 54 Stat. 1158. Pretrial motions to dismiss on the ground that the affidavit of good cause should have been filed contemporaneously with the complaint were denied. 142 F. Supp. 290, 325. On the fourth day of trial, however, Judge Palmieri granted petitioner's motion to dismiss on the ground that both the affidavit of good cause and the government's evidence at trial were extensively tainted by wiretapping. 145 F. Supp. 892. The Court of Appeals reversed, holding that evidence derived from wiretapping by state officers is admissible

in the federal courts and alternatively that the trial court should have afforded the government an opportunity to file a new affidavit of good cause and to demonstrate that it had sufficient untainted evidence at trial.[1] 247 F.2d 384. On April 7, 1958, this Court granted certiorari and reversed with directions to dismiss the complaint, on the ground that the affidavit of good cause should have been filed contemporaneously with the complaint. 356 U.S. 256.

Upon remand the District Court felt constrained by the mandate of this Court to enter an order of dismissal which did not specify whether it was with or without prejudice. The government presented a proposed order for dismissal "without prejudice," but it took no appeal from the court's refusal to sign this order.

On May 1, 1958, the government filed a new complaint seeking petitioner's denaturalization under § 340 of the Immigration and Nationality Act of 1952, 66 Stat. 260 (R. 3-14). Factually the allegations of this complaint are very similar to the allegations of the prior complaint. It alleges that petitioner procured his citizenship by wilful misrepresentation in that: (a) he stated that his occupation was real estate, whereas his occupation was the illicit purchase and sale of alcohol; (b) he stated that Harry C. Sausser, one of his naturalization witnesses, was in the real estate business and had personal knowledge of his good moral character, whereas Sausser was engaged with him in the illicit purchase and sale of alcohol; (c) he stated that the only other name he had ever used was

[1] This opinion was handed down prior to the decision in *Benanti* v. *United States*, 355 U.S. 96.

Francisco Castiglia, whereas he had also used the names Frank Stello and Frank Saverio; (d) he stated that he would support and defend the Constitution and laws of the United States and that he would bear true faith and allegiance to the same, whereas he was then violating both federal and state laws relating to alcohol and income tax and intended to continue so to do; and (e) he stated that he had never been arrested or convicted, whereas he had been arrested four times and convicted of unlawful possession of a firearm. The complaint further alleged that petitioner procured his citizenship by concealment of a material fact, in that he concealed the fact tha Sausser was engaged with him in the illicit purchase and sale of alcohol and knew him to be a person of bad moral character.

This case came on for trial before Judge Dawson, who found that the government had established two of the foregoing allegations, namely, allegations (a) and (d), *supra*, and judgment was entered revoking petitioner's naturalization.[2] Judge Dawson stated that he was not convinced that any of the government's other allegations had been established by the degree of proof requisite in an action of this nature (R. 29).

The evidence relevant to petitioner's occupation and oath of allegiance may be summarized as follows. Joseph Conway, a former letter carrier, testified that he had delivered mail addressed to Frank Costello, Edward Costello, Harry Sausser, Edward Ellis, and others at 405 Lexington Avenue during 1924-1926 (R. 52-53). He saw petitioner and Sausser three or four

[2] The opinion does not discuss petitioner's alleged tax offenses, and it is clear that Judge Dawson relied solely upon his alleged alcohol offenses as showing a state of mind inconsistent with the oath of allegiance.

times a week at this office (R. 55). It was stipulated, however, that the office telephone was listed in the name of Edward Costello, petitioner's brother (R. 58).

Emanuel Kessler testified that he went into the bootlegging business in 1920 and in the following year acquired an ocean-going vessel which transported whiskey from Europe (R. 60). The whiskey was landed at night on Long Island by means of small fishing boats (R. 60). Petitioner told Kessler that he and his brother would haul the merchandise from Long Island if Kessler would buy some trucks for them (R. 61-62). Thereafter Kessler financed the purchase of two or three trucks, and petitioner or his brother commenced to haul the liquor (R. 62). It was stored in a garage belonging to Edward Costello and also in the Blackwell Mansion, a residence owned or leased by unspecified members of the Costello family (R. 62-64). Kessler would telephone the Costellos' office at 405 Lexington Avenue to make the necessary arrangements (R. 62-63). He paid two dollars per case for transportation and storage, and approximately 3000 cases were imported each week (R. 64-65). These arrangements continued until Kessler was sent to the penitentiary for bootlegging at the end of 1923 (R. 59, 61).

This witness testified that in 1922 or 1923 he had accused petitioner of converting 500 cases of whiskey which were stored in the Blackwell Mansion (R. 66-67). He also testified that he left petitioner 100 or 200 cases when he went to prison and that petitioner subsequently refused to pay for them (R. 67-68).

Kessler's testimony was unclear as to the extent of petitioner's participation in the trucking enterprise. He first testified that he did not know what interest petitioner had in it, if any (R. 62, 65, 67, 71, 73). After

a lengthy cross-examination, however, he testified that petitioner's brother "ran the trucking business" (R. 74).

The government introduced the deposition of Albert Feldman, also a former bootlegger, who testified that petitioner agreed to store 1000 cases of whiskey for him prior to Kessler's conviction (R. 168-170). Subsequently petitioner advised Feldman that he had a customer for the liquor in Buffalo, but the liquor disappeared en route and petitioner never reimbursed Feldman (R. 172-174). Feldman further testified that he witnessed an argument between petitioner and Kessler over the alleged disappearance of certain liquor (R. 174-176).

Frank Kelly testified concerning bootlegging activities at a later date. He stated that one Coffey introduced him to petitioner and Harry Sausser shortly before they were all indicted in December of 1925 (R. 82-83). He agreed to let Sausser store some merchandise on his vessel, the *Vincent A. White* (R. 81, 84-85). Sausser and petitioner were present once or twice when unsuccessful attempts were made to land this liquor (R. 85). The witness was uncertain whether petitioner overheard his original conversation with Sausser (R. 87-93). None of the liquor was ever landed and the *Vincent A. White* took it back to Nova Scotia after the indictment was returned (R. 85, 94).

A deposition of Sausser's daughter, Helen, was read into evidence by the government. She testified that she was born in 1907 and that her family moved to Commack, Long Island, in 1924 or 1925 (R. 109, 112-114). Petitioner attended several social gatherings at their Commack residence (R. 115). Miss Sausser

testified that petitioner and her father were in the bootlegging business together and shared an office on Lexington Avenue (R. 116-118). This testimony was based upon conversations which she claimed to have overheard while she was an adolescent (R. 118-120, 127-131). Objections to this testimony on the ground of hearsay and uncertainty were overruled (R. 119, 121-123). Miss Sausser stated that she did not think her father was in the real estate business and that she did not think the Lexington Avenue office was a real estate office (R. 123). This testimony was based upon the fact that she never heard her father discuss the real estate business and that on the three or four occasions when she visited the office she did not hear any discussion of real estate (R. 131-132). Her father died in Canada on September 28, 1926 (R. 123-124). Petitioner sent her mother a telegram promising to forward money, but never did so (R. 125-126).

The government then introduced the deposition of one John McLeod. This witness testified that he joined the Coast Guard in April of 1925 and that subsequently he overheard Sausser talk about losing a boat loaded with liquor (R. 135-137).

The deposition of Philip Coffey was also introduced by the government. Coffey was arrested for violation of the National Prohibition Act in 1925 but the jury were unable to agree (R. 139). He worked for Kessler and later purchased liquor from Eddie Costello (R. 139-143). He saw petitioner in the Lexington Avenue office but all his business was with Eddie (R. 144-146). In 1953 he signed a statement at the office of the Immigration and Naturalization Service to the effect that he had purchased liquor from petitioner (R. 146-147, 149). In this deposition, however,

he swore that all of his business was with Eddie, although he discussed the matter with petitioner as well (R. 149-151).

Coffey further testified that he unloaded the *Vincent A. White* shortly prior to his arrest at the request of Frank Kelly (R. 152-153). One Ellis paid him for this work at the Lexington Avenue office (R. 155). He testified that he "probably" knew petitioner and Kelly were in this deal together, and that he "probably" thought the liquor was petitioner's because petitioner was with Kelly when it was unloaded (R. 156, 159).

At the conclusion of its case, the government introduced certain extrajudicial admissions by petitioner. In a statement given to Special Agent James N. Sullivan of the Bureau of Internal Revenue in 1938, petitioner testified that he was in the liquor business from 1923 or 1924 until about a year or two before repeal (R. 177-178).

Petitioner also testified before a federal grand jury in 1939 that he "did a little bootlegging" and that "the last time was around 1926" (R. 180).

In 1943 petitioner testified at length before a New York State grand jury and an official referee appointed by the Appellate Division in connection with the election of Judge Thomas A. Aurelio to the New York Supreme Court. Judge Palmieri found at the prior trial that this testimony was extensively infected by wiretapping. 145 F. Supp. 892. It was nevertheless re-offered, and was admitted by Judge Dawson, who relied heavily upon it in his opinion (R. 23-25).

Petitioner testified before the state grand jury that he had advanced substantial sums to one Arnold

Rothstein during the 1920's; that he might have obtained this money "bringing a little whiskey in"; that he was in the bootlegging business during prohibition; that he had an office at 405 Lexington Avenue as early as 1925; that one Jim O'Connell trucked whiskey for him; that in 1936 he filed state income tax returns for the years 1919-1932 showing an aggregate income of $305,000; and that he reported an income of $51,000 for 1927, $48,000 for 1929, and $35,000 for 1930 (R. 183-188). Petitioner further testified that "maybe" most of this money came from bootlegging, but that he was also in the real estate business and that he recalled making $25,000 on the sale of a building at West End Avenue and 92nd Street (R. 188-189). This transaction was handled through the Koslo Corporation (R. 188). Petitioner stated that the money which he invested might have been obtained from liquor and gambling and that he could not distinguish between the two sources (R. 189).

The foregoing testimony was in substance repeated before a special master appointed by the Appellate Division. This testimony was also admitted into evidence over objection on the ground of wiretapping (R. 190-192).

Petitioner's testimony before the New York State Liquor Authority in 1947 was likewise introduced by the government. Petitioner there testified that he had been in real estate, gambling, and bootlegging; that he was engaged in bootlegging from 1923 until 1926 or 1927; that he imported whiskey into the United States during this period; that his headquarters were located at 405 Lexington Avenue; and that he purchased liquor in Canada through Harry Sausser (R. 194-196).

As part of its case, the government introduced the official records relating to petitioner's naturalization, which were annexed to the complaint as part of Exhibit A. The preliminary form bears the date May 1, 1925, and lists his occupation as "real estate" (Gov't Ex. 7; R. 200-201). The docket slip, which consists of typed notations made by the naturalization examiner who examined petitioner and his two witnesses, is also dated May 1, 1925, and also lists his occupation as "real estate" (Gov't Ex. 8; R. 202-203). The formal petition for naturalization bears the same date and lists the same occupation (Gov't Ex. 9; R. 204-205). It contains an oath of allegiance which was subscribed by petitioner at the time of his naturalization on September 10, 1925.

Petitioner relied upon documentary proof to establish the truthfulness of his statements concerning his occupation. Most of this documentary proof was produced by Harold Kapner, a government witness who had searched the records of Manhattan, Brooklyn, Queens, and the Bronx covering the years 1920-1926 for real estate transactions involving this petitioner (R. 94). Kapner testified that during this investigation he learned that petitioner was associated with the Koslo Realty Corporation, and he produced its certificate of incorporation dated October 31, 1924, and recorded December 22, 1924 (R. 106; Gov't Ex. 23; R. 217-222). He likewise learned that one Samuel Beilin had been associated with petitioner in the Koslo Realty Corporation (R. 97-98).

Kapner produced records showing that on December 1, 1924, Koslo purchased certain property located at West End Avenue and 92nd Street in Manhattan from Samuel and Anna Beilin, subject to mortgages

aggregating $76,800 (Gov't Ex. 18; R. 208). Koslo is described in the deed as "a domestic corporation having its office and principal place of business at 217 Broadway." On June 22, 1925, Koslo sold these premises, together with the buildings and improvements located thereon, to the 666 West End Avenue Corporation, subject to prior mortgages aggregating $75,600 and a purchase money mortgage of $41,230 (Gov't Ex. 17 and 24; R. 206-207, 223-224). This deed was signed by one Louis E. Felix as president of Koslo. The purchase money mortgage was released on December 21, 1925, and the release was signed by Frank Costello as president of Koslo (Gov't Ex. 25; R. 225-226).

Kapner produced records showing a second series of transactions by Koslo during this period. On August 12, 1925, Koslo purchased three lots in the Bronx from Mary C. and Minnie R. Newell (Gov't Ex. 19 and 20; R. 209-212). On June 22, 1926, Koslo sold this property to the Rosenblum Realty Corporation (Def't Ex. C; R. 231-232). Koslo is described in all of these deeds as a domestic corporation having its principal place of business at 405 Lexington Avenue, and the deed to Rosenblum Realty was signed by Samuel Beilin as treasurer of Koslo.

The third and apparently the largest transaction of Koslo during this period involves several pieces of ground on Nelson Avenue in the Bronx. On October 26, 1925, Koslo purchased this land from the Claire Building Corporation and gave back purchase money mortgages aggregating $70,000 (Gov't Ex. 21 and 22; R. 213-216). In this transaction Koslo used the address 217 Broadway. On July 15, 1926, Koslo deeded the land, with the buildings and improvements

thereon, to the R. G. & F. Construction Corporation subject to mortgages aggregating $310,000 and also subject "to present leasings, lettings and tenancies" (Def't Ex. A and B; R. 227-230). These deeds were signed by Samuel Beilin as secretary.

In addition to the documentary evidence relating to Koslo, petitioner introduced the certificates of incorporation for the Babylon Waterfront Corporation and White Homes, Inc. (Def't Ex. D and E; R. 233-244). These were both New York corporations formed in 1926 and authorized to engage in the real estate business. Petitioner was named as an original director of both corporations, and he also signed the White Homes certificate as one of the incorporators. The Babylon Waterfront certificate indicates on its face that it was drafted by "Louis E. Felix, Attorney & Counselor at Law, #217 Broadway," who likewise signed the certificate as an incorporator. Kapner testified that petitioner was associated with both of these corporations (R. 106).

Petitioner elected to stand upon the government's evidence, except for the introduction of certain exhibits. After lengthy argument by counsel, Judge Dawson reserved decision. On February 20, 1959, he handed down an opinion which constituted his findings of fact and conclusions of law.

In this opinion, Judge Dawson found that the government had established two allegations constituting wilful misrepresentation and fraud, namely (R. 22):

> "1. That the defendant stated that his occupation was 'real estate' whereas his true occupation was bootlegging.

"2. That the defendant swore in his oath of allegiance to the United States, on September 10, 1925, that 'I will support and defend the Constitution and laws of the United States against all enemies, foreign and domestic; and that I will bear true faith and allegiance to the same;' whereas at the time the defendant was actually engaged in a course of activity which flouted the Constitution of the United States and was designed to violate the laws of the United States."

A supplemental judgment was entered on March 9, 1959, cancelling petitioner's certificate of naturalization (R. 43-44). Petitioner filed a notice of appeal on April 17, 1959 (R. 44). The Court of Appeals affirmed on February 17, 1960 (R. 245). It concluded that petitioner was guilty of wilful misrepresentation when he stated that his occupation was "real estate." It conceded, however, that petitioner was associated with a real estate company of which he later became president and that the government's inquiry as to occupation could have been construed as calling for no more than his legal occupation (R. 250-251).

The Court of Appeals was not satisfied that petitioner's oath of allegiance sustained a finding of fraud (R. 251). It expressly declined to pass upon any of the other allegations of the complaint, since they had not been relied upon by the trial court (R. 249). Nor did it pass upon the admissibility of petitioner's statements to New York State authorities. The defenses of laches and res judicata were held inapplicable.

SUMMARY OF ARGUMENT

The decision of the court below is completely inconsistent with this Court's decisions in *Nowak* v. *United States*, 356 U.S. 660, and *Maisenberg* v. *United States*, 356 U.S. 670. There petitioners were asked whether they believed in anarchy or belonged to any organization which taught or advocated anarchy or the overthrow of existing government in this country. In fact, they were not members of any anarchistic organization but they were members of the Communist Party. This Court held that they could not be denaturalized for answering the question in the negative, because they might reasonably have interpreted it as referring solely to anarchistic organizations.

Precisely the same situation is presented in this case. Petitioner was asked to state his "occupation" in May of 1925 and again in September of 1925. The record establishes and the Court of Appeals concedes that he was then associated with the Koslo Realty Corporation and that he subsequently became president of this corporation. There is uncontroverted documentary evidence of several substantial real estate transactions consummated by Koslo during this period. The Court of Appeals further found that petitioner could reasonably have interpreted the government's inquiry as calling for no more than the disclosure of his legal occupation. Under these circumstances, petitioner could not be guilty of any wilful misrepresentation when he answered "real estate."

Petitioner did not elect to take the stand on his own behalf. The Court of Appeals concluded that he had no constitutional right to stand silent because he was not a criminal defendant. It then held that while an applicant for citizenship might reasonably believe he

was bound to disclose only his legal occupation, there was no evidence that petitioner so believed. In other words, it concluded that petitioner's failure to take the stand warrants the inference that *he* understood the government's question as calling for disclosure of all income-producing activities, legal or illegal, although the question was plainly susceptible of a more restricted interpretation.

Here again, the Court of Appeals followed a course squarely contrary to the *Nowak* decision. This Court specifically refused to infer from Nowak's silence that he understood the crucial question as calling for disclosure of membership in both anarchistic and non anarchistic organizations advocating the violent overthrow of government. The quasi-criminal character of denaturalization proceedings is generally conceded. It compels recognition of the defendant's right to stand silent and put the government to its proof.

The Court of Appeals overruled the defense of laches with some reluctance, recognizing the hardship which results from cancelling a certificate of naturalization issued over thirty years ago. Petitioner was indicted for violation of the prohibition laws in the same court where he was naturalized one year after his certificate of naturalization was issued. The jury was unable to reach a verdict and ultimately the case was dismissed. It was the duty of the United States Attorney to institute denaturalization proceedings, if in fact petitioner's alleged offenses constituted "good cause" therefor. Instead, he waited for twenty-seven years before filing a complaint, while vital witnesses became unavailable to petitioner by reason of death. Under these circumstances, fundamental concepts of due process are violated by the present proceedings.

A subsidiary question presented by the petition for certiorari involves certain extrajudicial statements of petitioner which were heavily relied upon by both courts below. In the prior denaturalization proceedings against petitioner, the statements were excluded on the ground that they had been obtained by confronting petitioner with unlawfully intercepted telephone conversations to which he was a party. It is his position that the trial court was right the first time and that these statements must be excluded from consideration in determining whether the government's proof meets the exacting standards laid down in *Nowak* and *Maisenberg*.

Petitioner has moved for leave to amend the petition for certiorari by adding as a separate question the effect of the dismissal of prior denaturalization proceedings. These proceedings were dismissed pursuant to the mandate of this Court because the government's affidavit of good cause was not timely filed. The order of dismissal did not specify whether it was with or without prejudice. Under the plain language of Rule 41(b) of the Federal Rules of Criminal Procedure, it must hence operate as a dismissal with prejudice. The Court of Appeals conceded that none of the stated exceptions to this rule are applicable. Its attempt to create an unstated exception where dismissal is entered pursuant to the mandate of a higher court would create endless confusion in other cases. Moreover, the interests of justice are best served by a dismissal with prejudice where petitioner had already devoted six years to the defense of his citizenship in three different courts.

ARGUMENT

I. The Government Has Failed To Establish That Petitioner Misrepresented His Occupation

The most important and often reiterated allegation in the government's complaint is that petitioner misrepresented his occupation. The complaint alleges that he described his occupation as "real estate" in the preliminary form for naturalization, in the course of oral examination by the naturalization authorities, and again in the actual petition for naturalization, whereas his true occupation was the illicit purchase and sale of alcohol. These representations constitute the sole basis for denaturalization relied upon by the Court of Appeals.

Under the authorities, however, petitioner's citizenship cannot be revoked on this ground unless the government has proved that he was not in the real estate business at all, or, alternatively, that he represented real estate as his only income-producing activity at a time when he was also engaged in the illicit alcohol traffic. The government has never urged the latter interpretation of petitioner's answers as to occupation, and hence it undertook to establish that he was not in fact in the real estate business at all.

The government's own witness, Harold Kapner, produced clear documentary proof fatal to the government's position on this issue. Kapner testified that petitioner and one Beilin were associated with the Koslo Realty Corporation (R. 97-98, 106). He then produced deeds showing that Koslo purchased certain property located at West End Avenue and 92nd Street on December 1, 1924, exactly five months prior to the date which appears on petitioner's preliminary form, docket slip, and petition for naturalization

(Gov't Ex. 18; R. 208). Koslo sold these premises less than two months after this date, and a very substantial purchase money mortgage was released on December 21, 1925, approximately three months after petitioner was admitted to citizenship (Gov't Ex. 17, 24, 25; R. 206-207, 223-226). The release was signed by petitioner *as president of the Koslo Realty Corporation*. The government produced sworn testimony by petitioner in 1943 to the effect that he made a profit of $25,000 on this transaction alone (R. 188-189).

On August 12, 1925, one month before petitioner was admitted to citizenship, Koslo purchased three parcels of ground in the Bronx which were subsequently sold to the Rosenblum Realty Corporation (Gov't Ex. 19, 20; Def't Ex. C; R. 209-212, 231-232). Koslo is described in this transaction as a domestic corporation *having its principal place of business at 405 Lexington Avenue*, concededly an office used by petitioner during this period. The deed to Rosenblum Realty Corporation was signed by Beilin as treasurer of Koslo, and the government's own witness testified that Beilin was associated with petitioner in this corporation.

On October 26, 1925, six weeks after petitioner was admitted to citizenship, Koslo formalized its largest real estate transaction during this period, a transaction which must have been under negotiation at the very time of appellant's naturalization. The deeds show that Koslo purchased *unimproved* land which it subsequently deeded to the R. G. & F. Construction Corporation *with buildings and improvements*, subject to mortgages with an aggregate unpaid balance of $310,000 and also subject "to present leasings, lettings and tenancies" (Gov't Ex. 21, 22; Def't Ex. A, B; R. 213-216, 227-230). It is thus apparent that a large

apartment or office buiding was erected on the property while it was owned by Koslo. The deeds were again executed by petitioner's associate, Beilin, in his capacity as secretary of the corporation. Koslo used the address 217 Broadway, which was the office of Louis E. Felix, an attorney who was associated with petitioner's real estate activities (Def't Ex. D; R. 238).

Petitioner's continuing interest in the real estate business is attested by two certificates of incorporation for real estate corporations formed in 1926 (Def't Ex. D, E; R. 233-244). Petitioner was named in both certificates as a member of the original board of directors, and he also executed one certificate as an incorporator.

On the other hand, the evidence of petitioner's bootlegging activities during 1925 is extremely vague. Emanuel Kessler, the only witness whose testimony was apparently relied upon by the trial judge, went to prison in 1923 and gave no testimony whatsoever concerning petitioner's activities thereafter. Albert Feldman's testimony likewise related exclusively to events antedating Kessler's conviction. John McLeod's testimony related solely to Sausser's bootlegging activities and did not even mention petitioner. Frank Kelly testified that he agreed to store whiskey aboard the *Vincent A. White* at Sausser's request during 1925, but petitioner's only connection with this transaction was that he may have overheard the arrangements. Philip Coffey testified that he unloaded the *Vincent A. White* on one occasion during 1925 at Kelly's request, but here again petitioner's connection with the transaction was tenuous at best. The only other witness who testified concerning petitioner's alleged bootlegging during this period was Sausser's daughter.

Her testimony was based primarily upon conversations which she claimed to have overheard while she was still in her teens, and she was extremely vague on the subject of dates. She did not place any of these conversations definitely in 1925.

Petitioner's extrajudicial admissions likewise do not particularize the extent of his bootlegging activities in 1925. Special Agent Sullivan asked him whether he had "anything to do with the liquor business during the Prohibition era" and petitioner answered in the affirmative, fixing the period of time as "1923 or 1924 until about a year or two before Repeal" (R. 177). The nature and extent of his connection with the liquor business during this period were not explored. Similarly, petitioner told a federal grand jury that he "did a little bootlegging" and that "the last time was around 1926," but he was not asked for any details (R. 180).

It is petitioner's position that his testimony in the so-called Aurelio investigation is tainted by wiretapping and cannot be considered by this Court in determining the sufficiency of the evidence.[3] Moreover, while this testimony goes into some detail concerning petitioner's bootlegging activities, it fails to establish the extent of these activities during 1925. Petitioner admitted that he had made substantial sums "bringing a little whiskey in" during prohibition, and that in 1936 he filed income tax returns for the years 1919-1932 showing an aggregate income of $305,000 (R. 185-188). He reported an aggregate income of $134,000 for the years 1927, 1929, and 1930, leaving a balance of $171,000 attributable to

[3] See Point IV, *infra*, p. 39.

the remaining ten years, or an average annual income of $17,100 per year during this period.

Petitioner testified that most of this income was derived from bootlegging, but he said that he was also in the real estate business and that he recalled making $25,000 on the sale of a building at West End Avenue and 92nd Street (R. 188-189). The government's own exhibit shows that this profit was realized in 1925 and that petitioner was president of the corporation which handled the transaction. Consequently, the money which petitioner made from the real estate business in 1925 was substantially in excess of his average annual income during this period, indicating that the real estate business may well have been his principal or even sole source of income in 1925.

Finally, petitioner testified before the New York Liquor Authority that he had been in real estate, gambling, and bootlegging, and that he had imported whiskey from Canada during the years 1923-1926 or 1927 (R. 194-195). As was the case with the Sullivan and federal grand jury inquiries, however, he was never asked when, how much, or how often.

The sufficiency of the foregoing evidence must be measured by a very exacting standard of proof, which is virtually tantamount to proof beyond a reasonable doubt.[4] In the landmark case of *Schneiderman* v. *United States*, 320 U.S. 118, this Court held that the government needs more than a bare preponderance of the evidence to prevail in a denaturalization case,

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[4] In applying this standard of proof, an appellate court is free to re-examine the evidence without regard to the "clearly erroneous" principle embodied in Rule 52 (a) of the Federal Rules of Civil Procedure. *Baumgartner* v. *United States*, 322 U.S. 665, 670-671; *Cufari* v. *United States*, 217 F.2d 404, 408.

and that the allegations of the complaint must be established by "clear, unequivocal, and convincing" proof. This rule was reaffirmed in *Baumgartner* v. *United States*, 322 U.S. 665, 670, where this Court again reversed a denaturalization decree because "the case made out by the Government lacks that solidity of proof which leaves no troubling doubt in deciding a question of such gravity as is implied in an attempt to reduce a person to the status of alien from that of citizen." Recent decisions have imposed this same heavy burden of proof upon the government in expatriation and deportation cases. *Nishikawa* v. *Dulles*, 356 U.S. 129; *Rowoldt* v. *Perfetto*, 355 U.S. 115; *Gonzales* v. *Landon*, 350 U.S. 920.

This Court has expressly held, moreover, that the government cannot satisfy its burden of proof in a denaturalization case when the defendant could reasonably have believed his alleged misrepresentations to be truthful. Squarely in point are the recent cases of *Nowak* v. *United States*, *supra*, and *Maisenberg* v. *United States*, *supra*. There petitioners were asked whether they believed in anarchy or belonged to any organization which taught or advocated anarchy or the overthrow of existing government in this country. In fact, they were not members of any anarchistic organization, but they were members of the Communist Party. This Court held that they could not be denaturalized for answering the question in the negative, because they might reasonably have interpreted it as referring solely to anarchistic organizations.

Precisely the same situation is present in this case. Petitioner was asked to state his "occupation" in May of 1925 and again in September of 1925. The

record establishes and the Court of Appeals concedes that he was then associated with the Koslo Realty Corporation and that he subsequently became president of this corporation (R. 250). The Court of Appeals referred to a real estate transaction which was conducted by the Koslo Realty Corporation in June of 1925, just one month after petitioner filed his preliminary form for naturalization and three months before he was formally admitted to citizenship (R. 250). The record also contains uncontradicted documentary evidence of two other real estate transactions handled by Koslo Realty Corporation during this period.

The Court of Appeals further found that petitioner could have interpreted the government's inquiry as relating to his legal occupation. It stated (R. 250-251):

> "Surely it is conceivable that an applicant might believe that the answer called for no more than a disclosure of some 'legal occupation.'"

If petitioner was actually engaged in the real estate business—and the record shows that he was—and if the government's inquiry could reasonably have been interpreted as calling for no more than petitioner's legal occupation—and the court below found that it could—then petitioner could not be guilty of wilful misrepresentation when he answered "real estate." The contrary conclusion of the court below is clearly inconsistent with this Court's decision in *Nowak* and *Maisenberg*.

The result reached below is likewise in conflict with several well-reasoned cases from other circuits. In *United States* v. *Kessler*, 213 F.2d 53, defendant

answered in the negative the following question in her preliminary form for naturalization:

> "Have you ever been arrested or charged with the violation of any law of the United States or State or any city ordinances or traffic regulation?"

Defendant had been arrested no less than seventeen times on charges of "Obstructing highway," but each time she was released by the magistrate. The Court of Appeals, sitting en banc, held that this was not a predicate for denaturalization because there was no such offense as "Obstructing highway," and defendant was justified in believing that the naturalization form required information only as to valid arrests.

A similar result was reached in *Baghdasarian* v. *United States*, 220 F.2d 677, where defendant stated in the course of her naturalization proceedings that she had not belonged to any organizations other than "The Village Congregational Church" during the preceding ten years. The evidence showed that she had been enrolled as a member of the Communist Party by her husband during this period, that she later found a membership card with her name on it, and that she made no effort to dissociate herself from the Party, although she took no active part in it. Prior to trial she told an investigator of the Immigration and Naturalization Service that she had concealed her membership because she knew it would block her citizenship, but at trial she testified that she had denied membership because she did not consider herself a member. Under these circumstances, the Court of Appeals concluded that she lacked the intent requisite to membership in the Communist conspiracy and that she was under no obligation to disclose the existence of her Communist Party membership card.

The Third Circuit also refused to impose an affirmative duty of disclosure in *United States* v. *Minerich*, 250 F.2d 721. In December of 1927 defendant told two naturalization examiners that he had no criminal record. In February of 1928 he was arrested for disorderly conduct, released, and arrested again for criminal contempt. He was convicted of the latter charge on March 2, 1928. Seventeen days later he was admitted to citizenship. He was not interrogated again about his criminal record, and he did not disclose his intervening arrests and conviction. The court refused to hold that he had any duty of disclosure and unanimously reversed the denaturalization decree.

A final case of great significance is *Boufford* v. *United States*, 239 F.2d 841. There defendant was convicted under 18 U.S.C. § 1015(a) for making a false statement in his preliminary naturalization form. He stated that he had been married once, whereas in fact he had been convicted for going through a second and bigamous marriage ceremony. The Court of Appeals ruled that he could reasonably have interpreted this question as referring only to valid marriages, and it reversed his conviction because this issue had not been submitted to the jury.

Under the foregoing authorities, it was clearly not enough for the government to show that petitioner was engaged in the illicit purchase and sale of alcohol. It is obviously possible for persons engaged in the real estate business to be at the same time guilty of income-producing criminal conduct. If a real estate broker is guilty of larceny, embezzlement, forgery, tax evasion, or bootlegging, his "occupation" is still real estate. If he fills out a form which asks for his "occupation," he is not required to state "thief."

"embezzler," "forger," "tax evader," or "bootlegger." If the authorities want an exhaustive list of every income-producing activity in which he has been engaged during a specified period, they must so state. Otherwise, there can be no misrepresentation if he honestly states his principal legitimate occupation.

Here the record is clear that petitioner's principal legitimate occupation in 1925 was real estate. Indeed, the government has failed to prove by clear, convincing, and unequivocal evidence that real estate was not his principal occupation, legitimate or otherwise, during the crucial period. It has shown, at most, unlawful conduct of unspecified quantum and frequency. This is not enough to revoke a certificate of citizenship after thirty-five years.

II. No Inference May Be Drawn from Petitioner's Failure To Take the Stand

Petitioner did not elect to take the stand on his own behalf and the government did not call him as a witness. The Court of Appeals concluded that "the district court, though it did not do so, might properly have buttressed its findings by the unfavorable inferences to be drawn from the fact that Costello chose to remain off the witness stand . . ." (R. 248). It ruled that petitioner had no privilege to remain silent because he was not a criminal defendant, citing its prior decision in *United States* v. *Matles*, 247 F.2d 378, reversed on other grounds, 356 U.S. 256.

The Court of Appeals then proceeded to do what the District Court had not done. It stated that petitioner's failure to produce evidence of other real estate transactions by the Koslo Realty Corporation warranted the inference that there were no such trans-

actions (R. 250). It went on to state that while an applicant for citizenship might believe he was bound to disclose only his legal occupation, there was no evidence that petitioner so believed (R. 250-251). In other words, it concluded that petitioner's failure to take the stand warrants the inference that *he* understood the government's question as calling for disclosure of all income-producing activities, legal or illegal, although the question was plainly susceptible of a more restricted interpretation.

No other interpretation of the decision below is possible when it is compared with the case of *United States* v. *Profaci*, 274 F.2d 289, decided one month earlier by another panel of the Second Circuit. There defendant stated at the time of his naturalization that he had never been arrested, although he actually had a criminal record in Italy. The Court of Appeals reversed a decree of denaturalization on the ground that he could reasonably have interpreted the government's inquiry as relating solely to arrests in the United States, relying upon the *Nowak* and *Maisenberg* decisions.

There is one distinction, and only one, between *Profaci* and this case. Profaci took the stand and testified as to his interpretation of the crucial question, whereas petitioner did not. These two cases, taken together, commit the Second Circuit to the proposition that a denaturalization defendant stands silent at his peril.

This proposition is contrary to the *Nowak* decision. There the trial court specifically referred to defendant's failure to take the stand in support of its denaturalization decree. 133 F. Supp. 191, 196. This Court, however, refused to infer from Nowak's silence

that he must have understood the crucial question as referring to membership in the Communist Party.[5] Absent any evidence as to how Nowak actually understood the question, this Court resolved the ambiguity in his favor.

The right of a denaturalization defendant to stand silent has been considered in two other cases. In the first denaturalization proceeding against petitioner, he was compelled to take the stand over his objection. Judge Palmieri filed an opinion, however, stating that he was in agreement with petitioner's assertion of privilege under the Fifth Amendment and was overruling it only to provide an adequate record for appellate review. 144 F. Supp. 779.

Likewise, Chief Judge Clark expressed grave doubts in *Matles* as to the propriety of compelling a defendant to denaturalize himself. He concluded that "this important issue must of course await final settlement by the Supreme Court." 247 F.2d at 382. This Court, however, did not reach the issue because it ordered dismissal of the proceedings on the ground that the

[5] The opinion states, 356 U.S. at 665, footnote 3:

"No evidence was introduced tending to show that Nowak actually understood Question 28 as calling for disclosure of his membership in the Communist Party. The Government argues that the requisite understanding of the question should be imputed to Nowak, 'an important functionary in the Party, and an intelligent man,' because of the fact that for some period prior to 1937 the deportation and exclusion statutes applied to aliens 'who are anarchists; aliens who believe in or advocate the overthrow by force or violence of the Government of the United States or of all forms of law': Act of October 16, 1918, 40 Stat. 1012. The gap in the Government's proof cannot be filled in such tenuous fashion, especially in view of the citizenship provisions of the Nationality Act of 1906 referred to in the text."

affidavit of good cause had not been timely filed. 356 U.S. 256.

The issue thus left unresolved in *Matles* is again raised in this case. If it was definitively resolved in *Nowak*, the instant case was wrongly decided below. If it was not definitely resolved in *Nowak*, it should now be resolved in petitioner's favor.

The courts have repeatedly recognized the quasi-criminal character of denaturalization proceedings. *United States* v. *Minker*, 350 U.S. 179; *Schneiderman* v. *United States*, *supra*; *United States* v. *Genovese*, 133 F. Supp. 820, affirmed, 236 F.2d 757, certiorari denied, 352 U.S. 952; cf. *Abel* v. *United States*, 362 U.S. 217; *Jordan* v. *DeGeorge*, 341 U.S. 223, 231; *Gonzalez-Jasso* v. *Rogers*, 264 F.2d 584, 587.

It is settled, moreover, that the protection of the Fifth Amendment extends to certain non-criminal sanctions. In *Boyd* v. *United States*, 116 U.S. 616, this Court struck down a statute which compelled production of invoices for certain imports. The government sought only the forfeiture of the imports and not the conviction of the importers. This Court stated that such forfeiture proceedings, though civil in form, were criminal in nature, and further that no inference could be drawn from the importers' refusal to produce evidence which might subject their goods to forfeiture.

There is thus ample precedent for holding that a denaturalizatio. defendant cannot be compelled to take the stand and that no inference may be drawn from his failure to testify. No other rule is consistent with the government's heavy burden of proof in denaturalization proceedings. If a denaturalization

defendant takes the stand in his own defense, he waives his privilege against self-incrimination. *Brown v. United States*, 356 U.S. 148. If an inference may be drawn from a denaturalization defendant's failure to take the stand, he is confronted with a grave dilemma. If he takes the stand, he can be compelled to incriminate himself; if he does not take the stand, he can be denaturalized on the basis of his silence. In both instances, the government is relieved of its heavy burden of proof.

The defendant's dilemma is particularly serious under the 1952 Act. The sole basis for denaturalization under present law also constitutes a criminal offense under 18 U.S.C. § 1015(a). The alternative between unfavorable inference and involuntary waiver becomes particularly harsh under these circumstances. And, as pointed out by Chief Judge Clark in *Matles*, the issue in many denaturalization proceedings is close to that involved in prosecutions under the Smith Act, 18 U.S.C. § 2385, or the Internal Security Act, 50 U.S.C. §§ 843, 855. 247 F.2d at 381.

These serious problems can only be avoided by compelling the government to prove its case by clear and convincing evidence, without resort to inferences drawn from the defendant's silence or to process for the purpose of compelling his testimony.

III. Due Process Precludes Denaturalization of Petitioner by Reason of Delay in the Institution of Suit

The Court of Appeals dismissed from consideration the long delay between naturalization and denaturalization in the opening paragraph of its opinion. It pointed out that this is "another of those troublesome denaturalization cases, instituted by the govern-

ment in an effort to have the court cancel a certificate of naturalization issued over thirty years ago" (R. 245-246). It further pointed out, however, that there was no applicable statute of limitations, and it regarded independent consideration of the defense of laches as foreclosed by *United States* v. *Summerlin*, 310 U.S. 414, 416.

Concededly a denaturalization proceeding is equitable in nature. Concededly also a court of equity will refuse relief on the ground of laches where there has been an unreasonable delay on the part of the moving party, resulting in detriment to the non-moving party.

Here there can be no question as to the element of delay. Petitioner was indicted in the Southern District of New York for conspiracy to violate the National Prohibition Act in 1925. The case went to trial in 1927, and the jury were unable to agree as to petitioner. Subsequently the case was dismissed on motion of the prosecution. Petitioner testified at length before a federal grand jury in the Southern District of New York in 1939, and there was again evidence of alleged bootlegging activities on his part. The United States Attorney had an obligation promptly to institute denaturalization proceedings, if in fact such activities constitute "good cause" therefor. Instead, the government waited for twenty-seven years after petitioner's indictment and thirteen years after his grand jury testimony.

Moreover, petitioner has clearly been prejudiced by this delay. The naturalization examiners who processed his petition for citizenship are dead; the witnesses who testified on his behalf are dead; the

judge who admitted him to citizenship is dead. The memories of the few witnesses still alive have been dimmed by the passage of more than thirty years. While it might at first be thought that this evidentiary attrition would operate only against the government, which has the burden of proof, the courts have recognized that it may operate against the defendant as well. Cf. *United States* v. *Irvine*, 98 U.S. 450, 452. Moreover, it is conceded that the government will seek deportation if the denaturalization decree is affirmed. Deportation would have been harsh punishment thirty years ago. Today, when petitioner is almost seventy years old, it approaches capital punishment in severity.

The only real issue thus centers around the availability of laches as a defense in proceedings instituted by the United States. Justice Story was the architect of this immunity from the defense of laches in the United States. He wrote two opinions which are still the leading authorities on the subject. *United States* v. *Hoar*, 2 Mason, 311, Fed. Cas. No. 15,373; *United States* v. *Kirkpatrick*, 9 Wheat. 720, 735. These opinions make it clear that the rule *quod nullum tempus occurrit regi* was adopted in this country for one reason, and one reason alone—to safeguard public property rights against the negligence and faithlessness of public servants. It was forged in England to protect the tangible prerogatives of royalty, and it was followed in the United States to protect the tangible prerogatives of democracy.

Every decision of the Supreme Court applying this rule, from the *Kirkpatrick* case down to the present time, has involved public property, public revenue, or

some similar public right.[6] The overwhelming majority of the lower federal court decisions applying this rule likewise involve public property or pecuniary rights.[7]

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[6] These decisions fall in three broad categories. The first category embraces suits on surety bonds. See *United States* v. *Mack*, 295 U.S. 480; *United States* v. *Beebe*, 180 U.S. 343; *United States* v. *Thompson*, 98 U.S. 486; *Gaussen* v. *United States*, 97 U.S. 584; *Hart* v. *United States*, 95 U.S. 316; *Jones* v. *United States*, 18 Wall. 662; *United States* v. *Boyd*, 15 Pet. 187; *United States* v. *Knight*, 14 Pet. 301; *Smith* v. *United States*, 5 Pet. 292; *Dox* v. *Postmaster General*, 1 Pet. 318; *United States* v. *Nicholl*, 12 Wheat. 505; *United States* v. *Vanzandt*, 11 Wheat. 184.

The second category involves title to public lands. See *United States* v. *California*, 332 U.S. 19; *United States* v. *Northern Pacific R. Co.*, 311 U.S. 317; *Stanley* v. *Schwalby*, 147 U.S. 508; *San Pedro & Canon del Agua Co.* v. *United States*, 146 U.S. 120; *United States* v. *Dalles Military Road Co.*, 140 U.S. 599; *Redfield* v. *Parks*, 132 U.S. 239; *United States* v. *Insley*, 130 U.S. 263; *United States* v. *Beebe*, 127 U.S. 338; *United States* v. *Minor*, 114 U.S. 233; *Simmons* v. *Ogle*, 105 U.S. 271; *Armstrong* v. *Morrill*, 14 Wall. 120; *Gibson* v. *Chouteau*, 13 Wall. 92.

The third category involves miscellaneous monetary claims by the federal government. See *United States* v. *Summerlin*, 310 U.S. 414 (claim against decedent's estate); *Guaranty Trust Co. of New York* v. *United States*, 304 U.S. 126 (title to bank deposit); *Chesapeake & Delaware Canal Co.* v. *United States*, 250 U.S. 123 (dividends on stock owned by United States); *United States* v. *Michigan*, 190 U.S. 379 (money furnished to state for canal); *United States* v. *Nashville, Chattanooga & St. Louis R. Co.*, 118 U.S. 120 (interest on securities owned by United States); *Steele* v. *United States*, 113 U.S. 128 (proceeds of government materials sold to third parties); *Fink* v. *O'Neil*, 106 U.S. 272 (enforcement of judgment in favor of United States); *Cooke* v. *United States*, 91 U.S. 389 (liability on forged government securities).

[7] *United States* v. *Sharp*, 216 F.2d 602 (suit on a promissory note); *Woods* v. *Wayne*, 177 F.2d 559 (suit to recover rent overcharges); *United States* v. *First National Bank of Prague, Okl.*, 124 F.2d 484 (suit against guarantor of forged endorsement on government check); *United States* v. *Czarnikow-Rionda Co.*, 40 F.2d 214, certiorari denied, 282 U.S. 844 (suit to recover demurrage).

This result is dictated by considerations of policy as well as of precedent. It is settled that the *nullum tempus* rule is a rule of public policy and will be applied only when it serves the interest of public policy. The most authoritative exposition of this principle is found in the case of *Guaranty Trust Co. of New York* v. *United States,* 304 U.S. 126, where this Court held that foreign sovereignties are not immune from limitations or from laches. Chief Justice Stone stressed that the *nullum tempus* rule is narrowly restricted to those cases where public policy dictates its application.

In cases of this nature, involving the liberty of the individual citizen, it is clear that the *nullum tempus* rule does not serve public policy. A denaturalization proceeding, although civil in form, is far closer to a criminal prosecution than to the ordinary civil suit brought by the government for the protection of public property rights. Unreasonable delay in criminal cases requires dismissal of the prosecution.[8] The policy which protects a citizen from criminal prosecution after time has sealed the lips of his witnesses must also protect him from loss of citizenship under the same circumstances.

It is instructive to note that when Justice Story enunciated "the great public policy of preserving the public rights, revenues, and property" from loss by limitations or laches, this nation had long been committed to the greater public policy of protecting the citizen from prosecution for stale offenses. When the *Hoar* and *Kirkpatrick* cases were decided, not even

[8] *Petition of Provoo,* 17 F.R.D. 183, affirmed, 350 U.S. 857; *Williams* v. *United States,* 250 F.2d 19.

treason could be prosecuted after a lapse of three years. Act of April 30, 1790, c. 9, § 32, 1 Stat. 119. These two public policies can only be reconciled by confining the one to public property and the other to personal liberty.

Any other solution makes it inevitable that denaturalization proceedings will be motivated by post-naturalization conduct. It can scarcely be supposed that the government is seeking petitioner's denaturalization today on account of matters which it has known for more than thirty years. The real reason behind the government's complaint must lie in some supposed misconduct, neither alleged nor proved, which occurred *after* petitioner's naturalization. The government is thus in effect attaching a penalty to conduct by a naturalized citizen which it could not attach to similar conduct by a native-born citizen. *Trop* v. *Dulles*, 356 U.S. 86.

Denaturalization under these circumstances is inconsistent with the concept of due process. Whatever might be the case when the conduct relied upon to support denaturalization does not come to the attention of the authorities, due process precludes denaturalization under the circumstances of this case. The application of the *nullum tempus* rule in this case violates petitioner's constitutional rights. The protection of the due process clause must be broad enough to prevent denaturalization when the government takes no action for decades after discovery of the allegedly disqualifying facts, and, in the interim, death deprives the citizen of testimony which might vindicate his citizenship.

IV. A Decree of Denaturalization Cannot Rest upon Evidence Tainted by Wiretapping

Both the trial court and the Court of Appeals relied heavily upon certain statements by petitioner to support their finding that his true occupation was bootlegging. These statements consisted of testimony given by petitioner before a New York State grand jury and also before a referee appointed by the Appellate Division of the New York State Supreme Court. This testimony was admitted over petitioner's objection that it was tainted by wiretapping. It is petitioner's position that this testimony must be excluded from consideration in determining the sufficiency of the government's evidence, because the record shows that it was in fact the fruit of illegally intercepted communications.

In the prior denaturalization proceedings against petitioner, the affiant of good cause testified that he based his affidavit upon four sources: petitioner's testimony before the New York State grand jury, petitioner's testimony before the Appellate Division referee, petitioner's testimony before the Kefauver Committee, and a so-called central office file of the Immigration and Naturalization Service. Government counsel declined to permit inspection of the central office file on the ground that it was "confidential." Judge Palmieri found that the remaining three sources "indicate on their face that wiretaps were extensively used and that there were innumerable wiretaps" and that these wiretaps "clearly vitiated the alleged admissions in the aforementioned hearings by the defendant from the standpoint of their use as evidence," citing *United States* v. *Goldstein*, 120 F.2d

485, affirmed, 316 U.S. 114, and *Legra* v. *Deano*, 347 U.S. 556, 561.[9]

The Court of Appeals reversed Judge Palmieri's decision, holding that the government should have been permitted to file a new affidavit of good cause that the court should have given the government an opportunity to demonstrate that it had sufficient untainted evidence, that the fruit of wiretaps antedating the Communications Act of 1934 is admissible, and that the fruit of wiretaps by state officers, if obtained without federal connivance, is similarly admissible.[10] The government also urged very strenuously that petitioner's testimony was not in fact the fruit of wiretaps,[11] but Chief Judge Clark explicitly rejected this argument *in limine*, stating, 247 F.2d at 385-386:

> "The moving papers included extracts from the defendant's testimony before a New York County Grand Jury in 1942; before a referee appointed by the New York State Appellate Division, First Department, in 1943 in regard to disciplinary proceedings against Attorney Thomas A. Aurelio; and before the Special (Kefauver) Committee of the United States Senate to Investigate Organized Crime, which held hearings in 1950 and 1951. These transcripts suggested that state officers had indeed tapped the defendant's phone in 1943, *as a*

[9] The quoted language is taken from Judge Palmieri's oral opinion in the first trial of this action. Civil No. 79-309, September 28, 1956 (unreported decision). This opinion was printed at pp. 102a-103a in the record filed in this Court with petitioner's petition for writ of certiorari in *Costello* v. *United States*, 356 U.S. 256, (No. 491, October Term, 1957).

[10] This opinion was handed down on July 22, 1957. This Court did not decide the case of *Benanti* v. *United States*, 355 U.S. 96, until December 9, 1957.

[11] Brief for Appellant, pp. 41-51, *United States* v. *Costello*, 247 F.2d 384.

result of which he testified before the three bodies to facts which he might not otherwise have revealed.". (Emphasis added.)

Thus the precise argument relied upon by Judge Dawson to sustain the admissibility of petitioner's testimony was once rejected by the Court of Appeals. The subsequent action of this Court was based upon entirely different grounds and does not affect the persuasiveness of this rejection.

Moreover, the exhibits themselves lend cogent support to Chief Judge Clark's conclusion. In the course of petitioner's interrogation before the New York State grand jury, District Attorney Hogan actually *quoted* no less than forty-eight of petitioner's intercepted conversations.[12] Mr. Hogan made it perfectly clear, moreover, that these forty-eight conversations were only a small fraction of the total number of conversations intercepted by his office. He referred to "dozens" of conversations between petitioner and one Erickson; to one hundred and thirty conversations between petitioner and one Moretti during a five month period; to "at least a dozen" conversations between petitioner and Moretti subsequent to this period; and to fifty intercepted conversations between petitioner and one Offner.[13] Mr. Hogan him-

[12] Gov't Ex. 3; Supplemental Record pp. 15-16, 18, 19-20, 21, 22, 23, 24, 25, 27, 28, 29, 32, 34, 35-36, 37, 46, 48, 49-50, 51, 53, 57, 58, 59, 62, 63-64, 65-67, 67, 69, 70, 95-96, 96, 96-97, 99, 102, 104, 122, 123, 123 (two conversations), 124, 125, 126, 127-128, 128, 132, 139, 141, 142, 143, 149.

[13] Id. at 99, 121, 122, 141. While Mr. Hogan testified in the present proceedings that information concerning some of the Moretti calls was obtained from the telephone company, this was never brought out before the grand jury (R. 30; R. 97).

self admitted in the court below that he confronted petitioner with intercepted conversations "whenever his memory seemed to fail, to refresh it" (R. 50).

One of the intercepted conversations actually quoted by Mr. Hogan was a conversation between petitioner and one James O'Connell, who was prosecuted with him in 1925 for violation of the National Prohibition Act.[14] How many other conversations with O'Connell may have been intercepted does not appear from the record. While the quoted conversation did not in terms refer to prohibition violations, it is highly significant that *on the very page after this conversation was read into the record* came petitioner's first admission that he had been in the bootlegging business during the 1920's and that O'Connell had been employed by him.[15]

A few days after petitioner's appearance before this grand jury, he testified before a referee appointed by the Appellate Division in connection with a related investigation (Gov't Ex. 2). Mr. Hogan made frequent references to petitioner's grand jury testimony,[16] and if this testimony is tainted the Appellate Division testimony must inevitably share the taint. Moreover, Mr. Hogan again made repeated reference to the inter-

[14] Id. at 102.

[15] Id. at 103.

[16] Gov't Ex. 2; Supplemental Record pp. 162, 176, 180, 183, 187, 188, 191, 193, 203, 222, 226, 230, 235, 239, 261, 263, 265.

cepted conversations themselves.[17] Several of the conversations were again quoted verbatim.[18]

The conclusion is irresistible that petitioner testified so fully and so freely concerning facts so incriminating only because he believed that his past history was an open book to the District Attorney by virtue of these intercceptions, the full extent of which was not revealed to him until long afterward. Mr. Hogan now testifies that he can recall nothing in the intercepted conversations which related to petitioner's activities before 1930 (R. 46), but he was careful not to apprise petitioner of this fact, if it is a fact, at the time of his interrogation. Petitioner would certainly have been justified in assuming that, if the District Attorney's transcriptions included conversations with one of his co-defendants in the 1925 prohibition prosecution, anything less than full confession would be worse than useless. Judge Dawson relied very heavily upon Mr. Hogan's interrogation of petitioner precisely because it contained facts and details not contained in petitioner's testimony on other occasions, when he was not confronted with countless intercepted conversations. It would be the height of naïvete to suggest that the confrontation and the confessions were mere coincidence.

Since both the law and the facts must be construed most favorably to the defense in a denaturalization case, by parity of reasoning any doubt as to the admissibility of evidence should likewise be resolved in favor of the defense. A decree of denaturalization

[17] Id. at 179, 183, 186, 191, 193-194, 195, 229.

[18] Id. at 197-198, 260.

should not rest upon evidence of dubious admissibility, any more than it should rest upon evidence of dubious credibility. In determining whether the government's proof complies with the standards laid down in *Nowak* and *Maisenberg*, petitioner's testimony before the state grand jury and the court referee must be excluded from consideration.

V. The Present Proceedings Are Barred by Dismissal of Prior Proceedings with Prejudice

Petitioner has moved for leave to amend the petition for certiorari by adding an additional question, namely, whether the present proceedings are barred by dismissal of prior proceedings with prejudice. On May 16, 1960, this Court postponed consideration of the motion and ordered it consolidated for argument with *United States* v. *Lucchese*, No. 57, October Term, 1960. Since petitioner will have no other opportunity to present a brief on this issue, a short statement of his position is included herein.

In dismissing the prior denaturalization proceedings against petitioner, Judge Palmieri expressly provided that the case was dismissed "without prejudice to the Government's initiating it anew on the very same grounds." 145 F. Supp. at 897. The Court of Appeals reversed but was in turn reversed by this Court, which held that an affidavit of good cause is a prerequisite to the initiation of denaturalization proceedings and that the affidavit must be filed with the complaint. This Court remanded the case to the District Court with directions "to dismiss the complaint." 356 U.S. at 257.

On May 31, 1958, Judge McGohey signed an order which "Ordered, Adjudged and Decreed that plaintiff's complaint be and the same hereby is dismissed."

Although the government had presented an order for dismissal "without prejudice," Judge McGohey signed an order in accordance with his understanding of the mandate of this Court. The government *took no appeal from the order as entered.*

This case and the *Lucchese* case were companion cases in this Court, reversed with identical directions. As in this case, the District Court felt constrained to enter an order of dismissal in the *Lucchese* case which did not specify whether it was with or without prejudice. The government, however, elected to prosecute an appeal which was dismissed on October 15, 1959. This Court granted certiorari to review the order of dismissal.

The central issue in both cases is the scope and effect of Rule 41(b) of the Federal Rules of Civil Procedure. This rule provides that an involuntary dismissal operates as an adjudication upon the merits and bars further proceedings upon the same cause of action except in three stated instances: where the order recites that it is without prejudice, where dismissal is for lack of jurisdiction, or where dismissal is for improper venue. Thus dismissals for failure to prosecute,[19] for failure to comply with an order of court,[20] and for failure to state a cause of action[21] all operate to bar further proceedings upon the same cause of action unless the order otherwise specifies.

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[19] *Edmund* v. *Moore-McCormack Lines*, 253 F.2d 143, certiorari denied, 358 U.S. 818; *Garden Homes* v. *Mason*, 249 F.2d 71, certiorari denied, 356 U.S. 963; *Reynolds* v. *Wabash Railroad Co.*, 236 F.2d 387.

[20] *United States* v. *Procter & Gamble Co.*, 356 U.S. 677; *Mooney* v. *Central Motor Lines*, 222 F.2d 572.

[21] *Brazier* v. *Great Atlantic & Pacific Tea Co.*, 256 F.2d 96; *Mullen* v. *Fitz Simons & Connell Dredge & Dock Co.*, 172 F.2d 601, certiorari denied, 337 U.S. 959.

In instances where the plaintiff is aggrieved by a dismissal under Rule 41(b), the appropriate remedy is to appeal from the judgment of dismissal and not merely to institute the proceedings anew.[22] The applicability of this principle is not affected by the fact that here the dismissal occurred after the present complaint had been filed. Where two actions are based upon the same claim, the dismissal of one operates as an adjudication upon the merits of the other. *Kuzma v. Bessemer & Lake Erie Railroad*, 259 F.2d 456.

None of the exceptions set forth in Rule 41(b) apply to this case. The filing of an affidavit of good cause is not a condition precedent to the acquisition of jurisdiction by the court. In *United States v. Failla*, 164 F. Supp. 307, the affidavit was not filed until after the proceedings were instituted, but the defendant entered no objection until six months after the entry of judgment against him. In denying his motion to vacate this judgment and dismiss the complaint, the court ruled that it had jurisdiction to enter the original judgment despite the untimely filing of the affidavit.

To the same effect is the decision of the Ninth Circuit in *Title v. United States*, 263 F.2d 28, 30, certiorari denied, 359 U.S. 989. There the District Court denied defendant's motion to dismiss on the ground that the government had at no time filed an affidavit of good cause, and the Court of Appeals dismissed his appeal for failure to prosecute. Two years later, defendant moved to vacate the original judgment and to dismiss the complaint, relying upon the decision of this Court in *Matles, supra*. In affirming the denial of

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[22] *United States v. Procter & Gamble Co., supra; Ma Chuck Moon v. Dulles*, 237 F.2d 241, certiorari denied, 352 U.S. 1002; see also *Berman v. Thomas*, 41 Ariz. 457, 19 P. 2d 685.

these motions; the Court of Appeals held that an affidavit of good cause is not a jurisdictional prerequisite to denaturalization proceedings and that the original judgment was in any event res judicata.

The two remaining exceptions set forth in Rule 41(b) are equally inapplicable. The prior proceedings were certainly not dismissed for improper venue, and the order of dismissal did not "otherwise specify" within the meaning of the rule.

The District Court concluded that the prior denaturalization proceedings were dismissed on jurisdictional grounds, and hence that the case came within one of the stated exceptions to the rule (R. 34-35). The Court of Appeals rested its decision upon far broader grounds. It agreed with petitioner that the case did not come within any of the stated exceptions to the rule, but concluded that dismissals entered pursuant to the mandate of a higher court constitute an unstated exception to the rule.

The Court of Appeals cited neither decisions nor legislative history in support of this construction. It concluded that the intention of all courts concerned would be violated and that pure technicalities would be exalted if the prior proceedings were held to bar a second denaturalization proceeding.

Like most rules of law created to suit the exigencies of a particular case, this unwritten exception to Rule 41(b) is bad law. It will play havoc with literally thousands of dismissals entered pursuant to the mandate of a higher court. Surely the Court of Appeals cannot mean that every dismissal entered pursuant to the mandate of a higher court is *without prejudice* unless it otherwise states. Nor can the Court of Appeals mean that a dismissal entered pursuant to the mandate

of a higher court is with prejudice unless it otherwise states or unless the intention of all the courts concerned would be violated by construing it as a dismissal with prejudice. Rule 41(b) was designed to avoid such exercises in judicial mind reading. If it is held inapplicable to dismissals pursuant to the mandate of a higher court, a chasm of chaos opens up in this field.

Even if we accept the subjective test enunciated by the Court of Appeals, it is far from clear that the courts intended the prior dismissal to operate without prejudice. The situation is entirely different from that presented by *United States* v. *Zucca*, 351 U.S. 91, where the District Court granted defendant's motion to dismiss for failure to file the affidavit of good cause contemporaneously with the complaint and entered an order of dismissal without prejudice, which was subsequently affirmed by the Court of Appeals and by this Court. There defendant was never put to the burden of a trial on the merits.

In this case the District Court denied petitioner's motion to dismiss for failure to file the affidavit of good cause contemporaneously with the complaint. Petitioner was then put to the burden of preparing for a trial on the merits. After four days of trial the case was dismissed. Petitioner was then put to the further burden of defending this dismissal in the Court of Appeals. He then elected to file a petition for certiorari in this Court. Almost six years elapsed before this Court ruled that the proceedings were fatally defective because the affidavit of good cause was not timely filed. The government has now forced petitioner to a second trial in the District Court, a second appeal to the Court of Appeals, and a second petition for certiorari. The second case has already lasted for more than two years. For the last eight years, petitioner has been engaged in the active defense of his citizenship.

Of course petitioner is willing to devote his remaining years and resources to this cause. The question is whether the government should thus deal with any citizen. It was through no fault of petitioner that the government failed to file its affidavit until too late and that the District Court erred in denying his timely motion to dismiss on this ground. It was through no fault of petitioner that he was forced to stand trial and to exhaust his appellate remedies in a proceeding which was in fact a nullity. The government, not petitioner, was in error.

Under these circumstances, it is not unreasonable to conclude that this Court meant what it said when it ordered the proceedings "dismissed." After long years of litigation, the interests of justice are best served here by a final termination of the proceedings. This result can be accomplished by applying the plain language of Rule 41(b) to the dismissal entered pursuant to the mandate of this Court.

CONCLUSION

For the foregoing reasons, petitioner urges that the judgment of the court below should be reversed and the case dismissed with prejudice.

Respectfully submitted,

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